Supreme Court, U.S.
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No. 87-689

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED TRANSPORTATION UNION,
Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
SOUTHERN RAILWAY COMPANY, AND
INTERSTATE RAILROAD COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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November 1987

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QUESTION PRESENTED

Whether a district court has jurisdiction to entertain an action seeking to review and set aside an arbitration award rendered pursuant to labor protective conditions imposed on a railroad transaction by the Interstate Commerce Commission under authority of the Interstate Commerce Act, when judicial review of the award in a court of appeals is independently available under that Act.

LIST OF PARTIES

The names of all parties to the proceeding are contained in the caption.

The common stock of respondents Southern Railway Company and Norfolk and Western Railway Company is wholly owned by Norfolk Southern Corporation. Respondent Interstate Railroad Corporation is a wholly-owned subsidiary of Southern Railway Company. The other subsidiaries and affiliates of respondents are:

Company	*Incorporated Under Laws of*
Southern Railway Company subsidiaries (in addition to Interstate Railroad Company):	
Airforce Pipeline, Inc.	North Carolina
Alabama Great Southern Railroad Company, The	Alabama
Arrowood-Southern Company	North Carolina
Arrowood Southern Executive Park, Inc.	North Carolina
Atlanta and Charlotte Air Line Railway Company, The	Georgia, North Carolina, South Carolina
Atlantic and East Carolina Railway Company	North Carolina
Camp Lejeune Railroad Company	North Carolina
Carolina and Northwestern Railway Company	North Carolina, Virginia
Central of Georgia Railroad Company	Georgia
Charlotte-Southern Corporation	North Carolina
Chattanooga Station Company	Tennessee
Chattanooga Terminal Railway Company	Tennessee
Cincinnati, New Orleans and Texas Pacific Railway Company, The	Ohio
Citico Realty Company	Virginia
Elberton Southern Railway Company	Georgia
Georgia Midland Railway Company, The	Georgia
Georgia Northern Railway Company, The	Georgia
Georgia Southern and Florida Railway Company	Georgia
High Point, Randleman, Asheboro and Southern Railroad Company	North Carolina
Live Oak, Perry and South Georgia Railway Company	Georgia
Louisiana Southern Railway Company	Louisiana

Company	*Incorporated Under Laws of*
Memphis and Charleston Railway Company	Mississippi
Mobile and Birmingham Railroad Company	Alabama
National Investment Company, The	Connecticut
New Orleans Terminal Company	Louisiana
Norfolk Southern Industrial Development Corp.	Virginia
North Carolina Midland Railroad Company, The	North Carolina
St. Johns River Terminal Company	Florida
South Western Rail Road Company, The	Georgia
Southern Rail Terminals, Inc.	Georgia
Southern Rail Terminals of Alabama, Inc.	Alabama
Southern Rail Terminals of North Carolina, Inc.	North Carolina
Southern Railway-Carolina Division	South Carolina
Southern Region Coal Transport, Inc.	Alabama
Southern Region Industrial Realty, Inc.	Georgia
Southern Region Materials Supply, Inc.	Georgia
Southern Region Motor Transport, Inc.	Georgia
State University Railroad Company	North Carolina
Tennessee, Alabama & Georgia Railway Company	Delaware
Tennessee Railway Company	Tennessee
Transylvania Railroad Company	North Carolina
Virginia and Southwestern Railway Company	Virginia
Yadkin Railroad Company	North Carolina
Norfolk and Western Railway Company subsidiaries:	
Chesapeake Western Railway	Virginia
Lake Erie Dock Company	Delaware
Lambert's Point Docks, Incorporated	Virginia
Nickel Plate Improvement Company, Inc., The	Indiana
Pocahontas Development Corporation	Kentucky
Pocahontas Land Corporation	Virginia
Scioto Valley and New England Railroad Company, The	Ohio
Shenandoah-Virginia Corporation	Virginia
Toledo Belt Railway Company, The	Ohio
Virginia Holding Corporation	Virginia
Wabash Railroad Company	Ohio
Wheeling and Lake Erie Railway Company, The	Ohio
Norfolk Southern Corporation subsidiaries (in addition to Southern Railway Company and Norfolk and Western Railway Company):	
Lamberts Point Barge Company, Inc.	Virginia

Company	*Incorporated Under Laws of*
Norfolk and Portsmouth Belt Line Railroad Company	Virginia
Norfolk Southern Marine Services, Inc.	Virginia
North American Van Lines, Inc.	Delaware
NS Fiber Optics, Inc.	Virginia
NS Transportation Brokerage Corporation	Virginia
NW Equipment Corporation	Delaware
Triple Crown Services, Inc.	Oklahoma
North American Van Lines, Inc. subsidiaries:	
Domestic:	
A Five Star Forwarding, Inc.	Delaware
A Three Rivers Forwarding, Inc.	Indiana
Agency Media Services, Inc.	Indiana
Almac Moving & Storage, Inc.	Massachusetts
Almac Moving & Storage of New Hampshire, Inc.	New Hampshire
Astro Express, Inc.	Massachusetts
City Storage & Transfer, Inc.	Colorado
COM TRANS, Inc.	Indiana
EHT, Inc.	Delaware
Fleet Insurance Management, Inc.	Indiana
Great Falls North American, Inc.	Montana
NACAL, Inc.	California
NAVTRANS Container Lines, Inc.	Florida
NAVTRANS International Freight Forwarding, Inc.	Indiana
NorAm Forwarding, Inc.	Indiana
NORAMCO, Inc.	Indiana
North American Distribution Systems, Inc.	Indiana
North American Forwarding, Inc.	Indiana
North American Freight Systems, Inc.	Texas
North American Moving & Storage, Inc.	Indiana
North American Properties, Inc.	Indiana
North American Van Lines of Texas, Inc.	Texas
Old Fort Insurance Company	Indiana
Relocation Management Systems, Inc.	Delaware
Rustalong Corp.	Arizona
Transportation Collections, Inc.	Indiana
Triangle Fleet Service, Inc.	Indiana
Foreign:	
Cold Lake Moving & Storage Ltd.	Canada

Company	*Incorporated Under Laws of*
Curry Moving & Storage Ltd.	Canada
Maumee Casualty Company Limited	Bermuda
NAVPAN, S.A.	Panama
NAVTRANS International Speditions GmbH	Germany
North American Van Lines Ltd.	United Kingdom
North American Van Lines Canada Ltd.	Canada
North American Van Lines (Alberta) Ltd.	Canada
North American Van Lines (Atlantic) Ltd.	Canada
Pease Van & Storage Ltd.	Canada
Star Storage Ltd.	Canada
Westlake Moving & Storage, Ltd.	Canada
Westmount Moving & Storage, Inc. (Demanagement Et Entreposage Westmount)	Canada

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IN THE

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INTERSTATE RAILROAD COMPANY,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Southern Railway Company ("Southern"), Norfolk and Western Railway Company ("NW"), and Interstate Railroad Company ("Interstate"), collectively referred to as "the Carriers," respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The June 30, 1987 opinion of the Court of Appeals is reported at 822 F.2d 1114, and appears in the Appendix to the petition ("Pet. App.") at p. 1a. The September 25, 1987 orders of the Court of Appeals denying petitioner's motion for leave to file a petition for rehearing instanter and petition for rehear-

ing en banc instanter appear in the Appendix to the petition at pp. 44a-45a.

The November 29, 1985 memorandum opinion and order of the District Court is reported at 627 F. Supp. 1008, and appears in the Appendix to the petition at p. 21a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1987. On September 22, 1987, the Chief Justice granted petitioner's application for an extension of time in which to file its petition, to and including October 28, 1987. The petition for a writ of certiorari was filed on October 28, 1987. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions pertinent to this case are 49 U.S.C. §§ 10505(g), 11347, and 28 U.S.C. §§ 2321(a), 2342.

49 U.S.C. § 11347 provides, in pertinent part:

> When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976 and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565).

49 U.S.C. § 10505(g) provides, in pertinent part:

> The Commission may not exercise its authority under this section . . . (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

28 U.S.C. § 2321(a) provides:

> Except as otherwise provided by an Act of Congress,

a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.

28 U.S.C. § 2342 provides, in pertinent part:

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

* * *

(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title and all final orders of such Commission made reviewable under section 11901(j)(2) of title 49, United States Code.

STATEMENT OF THE CASE

The petition seeks review of an opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the District Court's dismissal of this civil action for lack of subject matter jurisdiction. In this action, the United Transportation Union ("UTU") had invoked the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, as the source of authority for a suit to review and set aside an arbitration award rendered under labor protective conditions imposed on a railroad transaction by the Interstate Commerce Commission ("ICC" or "Commission") under authority of the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 10505(g), 11347.

A few years ago, the Carriers, three railroad subsidiaries of Norfolk Southern Corporation, decided that NW and Southern jointly would operate the properties of Interstate, a small railroad operating exclusively in the coal fields of southwestern Virginia. This new arrangement was designed to

permit the Carriers to take advantage of better grades and operating routes for coal traffic moving from Interstate origins to points on NW and Southern, and to achieve a variety of economies and efficiencies in their operations.

The Carriers petitioned the ICC for the necessary authorizations for various aspects of what is referred to here as the "Interstate Railroad transaction." On February 25, 1985, the ICC held that the contract allowing NW and Southern to operate the Interstate properties, and a subsidiary trackage rights agreement allowing NW to conduct operations over a short stretch of Southern's lines, were exempt, under a blanket ICC exemption issued pursuant to 49 U.S.C. § 10505, from the prior review requirements of 49 U.S.C. § 11343. To satisfy 49 U.S.C. § 10505(g), which obligates the ICC to impose appropriate labor protective conditions on transactions exempt from the section 11343 prior approval requirements, the ICC subjected the Interstate Railroad transaction to protective conditions known as the "*Mendocino Coast* conditions"[1] and the "*Norfolk & Western* conditions."[2]

As part of the Interstate Railroad transaction, NW was to assume control of all train operations previously conducted by Interstate crews. In order to carry out this transaction, the

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1. The *Mendocino Coast* conditions are the labor protective conditions adopted in *Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 354 I.C.C. 732 (1978), *modified*, 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Association v. United States*, 675 F.2d 1248 (D.C. Cir. 1982). These conditions were imposed on the exemptions permitting NW and Southern to operate the Interstate properties.

2. The *Norfolk & Western* conditions are those adopted in *Norfolk & Western Ry.—Trackage Rights—Burlington Northern, Inc.*, 354 I.C.C. 605 (1978), *modified sub nom. Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Association v. United States*, 675 F.2d 1248 (D.C. Cir. 1982). These conditions were made applicable to employees affected by NW's acquisition of trackage rights over Southern. Because there is no difference between the *Mendocino Coast* and *Norfolk & Western* conditions that could be material to this case, the conditions imposed on the Interstate Railroad transaction are generally referred to here as the *Mendocino Coast* conditions.

Carriers needed to make various changes in existing work arrangements. Changes in train crew assignments were an integral part of the transaction: the Interstate train and engine service employees were to be consolidated, for purposes of work assignments, with employees performing similar duties on NW's adjacent Pocahontas Division. Further, because of the operational difficulties that would be created if Interstate's twenty-seven trainmen remained under the existing Interstate/UTU collective bargaining agreement, the Carriers anticipated that these Interstate employees would become subject to the collective bargaining agreement in effect between NW and the UTU covering NW's trainmen.

Under the ICC's labor protective conditions, necessary employee assignment changes such as those inherent in the Interstate Railroad transaction are accommodated by "implementing agreements," which are either voluntarily negotiated or imposed through compulsory arbitration under procedures set forth in the protective conditions. In early 1985, the Carriers, anticipating favorable action by the ICC on their petitions, notified the UTU of the proposed Interstate Railroad transaction and sought negotiation of an implementing agreement. Following several months of negotiation, the Carriers and the UTU reached tentative agreement on an implementing agreement. This tentative agreement was ultimately not accepted, however, because the twenty-seven Interstate trainmen did not consent to the requirement, in the tentative agreement, that they transfer from the Interstate collective bargaining agreement to the NW collective bargaining agreement.

The Carriers then formally notified the UTU of their desire to submit the matter to mandatory arbitration pursuant to the ICC's *Mendocino Coast* conditions. The UTU declined to agree to the selection of a neutral referee. At the Carriers' request, and in accordance with the procedure established in the protective conditions, the National Mediation Board appointed Robert J. Ables, an experienced labor arbitrator, as the referee.

The Carriers and the UTU participated actively and extensively in the arbitration proceeding. A principal issue in the arbitration was whether the committee (in practice, the neutral referee) had the authority to impose an implementing agreement that transferred the Interstate employees from one collective bargaining agreement to another without their consent.

On September 25, 1985, referee Ables served his award (the "Ables award"). J.A. 15.[3] In the award, referee Ables concluded that he had the authority under the *Mendocino Coast* conditions to impose an implementing agreement containing a provision transferring employees from one collective bargaining agreement to another.[4] Acting on this authority, referee Ables imposed, as the final implementing agreement, the tentative implementing agreement that earlier had been rejected by the Interstate employees. The Carriers then notified the UTU that they intended to implement the Interstate Railroad transaction on November 1, 1985.

On October 25, 1985, the UTU filed this civil action in the District Court for the District of Columbia, alleging that the Carriers' planned action—in particular, the transfer of the twenty-seven Interstate employees to the NW/UTU collective bargaining agreement—would violate the RLA. The District Court dismissed the Complaint, pursuant to Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction. The District Court found that the UTU's lawsuit, in essence, sought review of the Ables award, which could not be had in the District Court because the award was either a final order of the ICC, reviewable exclusively in the Court of Appeals pursuant to 28 U.S.C. §§ 2321(a) and 2342(5), or a nonfinal

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3. Citations in the form "J.A. ___" refer to the Joint Appendix submitted to the Court of Appeals.

4. Referee Ables reasoned that "the ICC can take all necessary action to authorize a consolidation, including labor protective conditions and procedures to resolve disputes on implementing agreements including arbitration without deference to RLA collective bargaining rights." J.A. 30; see Pet. App. at 9a.

administrative decision of the ICC that was not ripe for judicial review because it had not yet been reviewed by the ICC itself. Pet. App. at 33a-35a.[5]

The UTU appealed, and the Court of Appeals, in a unanimous decision, affirmed. The Court of Appeals found that the District Court had "properly treated" the UTU's lawsuit as "a challenge to the arbitration award upholding the railroads' planned action." Pet. App. at 10a. Agreeing that the Ables award was "functionally an 'order of the Commission' within the meaning of 28 U.S.C. § 2321(a)," Pet. App. at 13a, the Court of Appeals held that, "regardless of whether it was final or non-final, the order is ultimately subject to the exclusive jurisdiction of the court of appeals." Pet. App. at 2a. The Court of Appeals rejected the UTU's contention that the District Court had jurisdiction over the lawsuit because the UTU had asserted violations of the RLA:

> The Union's complaint is with the Commission and the arbitration it set up. Its theory is that neither the Commission nor its arbitrator can lawfully issue an order that derogates the Union's rights under the RLA, not that they have somehow violated the RLA. To view the matter otherwise would be to allow the complainant's own description of its theory to determine the forum with jurisdiction.

Pet. App. at 14a.

ARGUMENT

1. The decision of the Court of Appeals represents the straightforward and correct application of a familiar principle of administrative law prohibiting collateral attacks on admin-

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5. The District Court had granted a temporary restraining order on October 31, 1985, which was continued in effect by consent until November 29, 1985, when the civil action was dismissed. Following the District Court's dismissal of the civil action, the Carriers fully implemented the Interstate Railroad transaction, and the Interstate trainmen are now working under the NW/UTU collective bargaining agreement.

istrative agency orders, and presents no important issues for review in this Court. This Court has long taught that when Congress assigns to a particular court jurisdiction to review agency orders, that jurisdiction is exclusive and forecloses challenges to such orders in a court different from the one Congress has designated. *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334-37 (1958); *see Venner v. Michigan Central R.R.*, 271 U.S. 127, 130-31 (1926). The Court of Appeals correctly adhered to these well established principles in holding that the UTU had "knocked on the wrong door," Pet. App. at 12a, when it sought to overturn the Ables arbitration award in the District Court, rather than in the forum chosen by Congress.

The Court of Appeals rightly found it "inescapable" that the Ables award was "functionally" an order of the ICC. Pet. App. at 13a. The arbitration proceeding leading to the Ables award was wholly a creature of the Commission, and owed nothing to the RLA. That proceeding was conducted under labor protective conditions that the ICC had imposed on the Interstate Railroad transaction pursuant to the Interstate Commerce Act, 49 U.S.C. §§ 10505(g)(2), 11347, and its authority flowed exclusively from that statutory source. In rendering his award, referee Ables was therefore serving as a delegate of the ICC, exercising authority vested in him by the Commission. *See Brotherhood of Locomotive Engineers v. ICC*, 808 F.2d 1570, 1579 n.75 (D.C. Cir. 1987).

The UTU brought this civil action in the District Court for the express purpose of "reviewing and setting aside" the Ables award. Complaint ¶ 1; see Pet. App. at 13a. By statute, however, it is the Court of Appeals that has exclusive jurisdiction to review final orders of the ICC, 28 U.S.C. §§ 2321(a), 2342(5), and accordingly that is the only court in which the UTU's challenge to the award may be heard.[6] It does not

6. The District Courts have jurisdiction to entertain specific types of civil actions arising under the Interstate Commerce Act, 28 U.S.C. § 2321(b), but the UTU does not claim that statutory source of jurisdiction is implicated here.

matter to this civil action—and the Court of Appeals did not decide—whether the Ables award is a final action of the ICC, immediately appealable to the Court of Appeals, or a nonfinal administrative action, reviewable first by the ICC, followed by direct judicial review once the ICC acts. In either case, a judicial remedy in the Court of Appeals is ultimately available to the UTU; thus, in either case, the UTU's attempt to overturn the Ables award in the District Court is a collateral attack and therefore impermissible. *See Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. at 421-22.

It is of no special significance that the UTU's collateral attack is assertedly founded on the RLA. The jurisdiction of the Court of Appeals to review ICC orders is complete and exclusive, and not dependent upon the particular legal theory advanced as grounds for setting the Commission's action aside. 28 U.S.C. §§ 2321(a), 2342(5). This Court has made clear that when Congress provides that review of agency action is to be had exclusively in the Court of Appeals, as Congress has done here, "all objections to the [agency's] order . . . must be made in the Court of Appeals or not at all." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. at 336. An agency's action cannot be attacked in a court other than the statutory review court even on the ground that the action violates another federal law. *Id.* at 334-37. This principle is well understood in the lower courts and has been correctly applied in numerous lower court decisions rejecting collateral attacks assertedly founded on the RLA. *E.g., Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 799-802 (1st Cir. 1986), *cert. denied*, 107 S. Ct. 111 (1987); *Augspurger v. Brotherhood of Locomotive Engineers*, 510 F.2d 853, 860 (8th Cir. 1975); *Carey v. O'Donnell*, 506 F.2d 107, 110-11 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); *Kesinger v. Universal Air Lines, Inc.*, 474 F.2d 1127, 1132 (6th Cir. 1973); *Oling v. Air Line Pilots Association*, 346 F.2d 270, 276-77 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965); *cf. Nemitz v. Norfolk & Western Ry.*, 436 F.2d 841, 844-46 (6th Cir.) (federal court jurisdiction to determine rights of parties under labor protective conditions arises under the ICA, not the

RLA), *aff'd on other grounds*, 404 U.S. 37 (1971). *See also County of Halifax v. Lever*, 718 F.2d 649, 653 (4th Cir. 1983); *City of West Chicago v. United States Nuclear Regulatory Commission*, 701 F.2d 632, 652 n.21 (7th Cir. 1983); *City of Rochester v. Bond*, 603 F.2d 927, 936-37 (D.C. Cir. 1979).

It is certainly not significant that the UTU did not name the ICC as defendant in the District Court or that the UTU chooses to characterize its action as one to vindicate asserted RLA rights, rather than one to defeat an order of the Commission. In the first place (although the UTU has now apparently forgotten it), the UTU's Complaint states forthrightly that this lawsuit in fact seeks the "reviewing and setting aside" of the Ables award. Pet. App. at 13a. In any case, this Court long ago rejected the idea that a court is bound by the plaintiff's own description of its claim when deciding whether that claim presents a collateral attack on agency action. Rather, the court is to scrutinize the facts to ensure that the claim, however it may be worded, does not actually amount to a collateral attack. *Venner v. Michigan Central R.R.*, 271 U.S. at 130; *Lambert Run Coal Co. v. Baltimore & Ohio R.R.*, 258 U.S. 377, 382 (1922). Consistently with this principle, this Court has recently confirmed that when Congress provides for review of final agency orders exclusively in the Court of Appeals, "[l]itigants may not evade these provisions by requesting the District Court to enjoin action that is the outcome of the agency's order." *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984). Yet that is just what the UTU has attempted to do here. In substance, the UTU seeks to undo the rearrangement of working conditions—the transfer of twenty-seven Interstate employees from one collective bargaining agreement to another—that the Ables award accomplishes. Although framed in RLA terms, the UTU's Complaint amounts to nothing more than a request that the Carriers be prevented from relying on the Ables award as authority for avoiding any RLA-based duty to negotiate with the UTU over the transfer of the Interstate employees that might otherwise arguably apply. The District Court obtains no jurisdiction over

this clear effort to nullify the import of the Ables award simply because it is couched in terms that disregard the statutory source of the award.

Contrary to the UTU's suggestion, Pet. at 16 n.10, this case presents no issue as to whether jurisdiction may be found in the District Court on the ground that the remedy sought and the legal controversy advanced there could not have been sought and advanced in the agency or on direct review.[7] The UTU's Complaint in fact seeks no substantive relief apart from avoidance of the consequences of the Ables award, *i.e.*, undoing the transfer of the twenty-seven Interstate employees. Moreover, all the legal grounds the UTU advanced in the District Court in support of its position that the Ables award should be set aside and its effect nullified—principally that the transfer of the Interstate employees is impermissible because it was not accomplished through bargaining in accordance with the procedures of the RLA—could and undoubtedly would have been raised in a direct review proceeding at the ICC or in the Court of Appeals. Indeed, the UTU's attack on the Ables award merely involves a determination as to whether referee Ables (and, ultimately, the ICC) exceeded the authority conferred by the governing statute; such a determination is a normal part of judicial review of agency action. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971). And if the UTU's arguments were found to be meritorious on direct review, all the relief the UTU sought in this civil action would then have been available to it.

The Court of Appeals is the first Circuit to decide squarely where lies the proper forum for judicial review of arbitration awards issued under ICC-imposed labor protective conditions. The Court of Appeals' answer to this routine question of administrative law is correct, and firmly rooted in the many decisions of this Court and the lower courts rejecting

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7. The UTU's reliance on *Cook v. Pan American World Airways, Inc.*, 771 F.2d 635 (2d Cir. 1985), *cert. denied*, 474 U.S. 1109 (1986), and *Beins v. United States*, 695 F.2d 591 (D.C. Cir. 1982), is therefore misplaced.

collateral attacks on agency orders.[8] Moreover, it is consistent with the approach taken by the ICC itself. During the pendency of this lawsuit, the ICC formally announced that it will exercise its authority to review arbitration awards rendered pursuant to its own labor protective conditions. *Chicago and Northwestern Transportation Co.—Abandonment—Near Dubuque and Oelwein, Iowa*, 3 I.C.C. 2d 729 (1987) (*"Oelwein"*), *appeal docketed*, No. 87-1629 (D.C. Cir. October 27, 1987).[9] Accordingly, under ordinary principles of finality, the UTU should have knocked first on the ICC's door and then, if it was unhappy with its reception there, presented the merits of its objections to the Ables award for consideration by the Court of Appeals on direct review of the ICC's final order under 28

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8. To be sure, as the Court of Appeals observed, Pet. App. at 16a-17a, two other Circuits, without analysis, have either concluded or assumed *sub silentio* that a district court has jurisdiction to entertain attacks on arbitration awards rendered under ICC-imposed protective conditions. The Court of Appeals, however, was correctly not persuaded by those decisions, which provided no reasoned explanation of why, contrary to the teaching of *Whitney, City of Tacoma*, and their progeny, this would be true. Pet. App. at 17a. *Compare Armstrong Lodge No. 762 v. Union Pacific R.R.*, 783 F.2d 131, 134-35 (8th Cir. 1986) (assuming district court had jurisdiction to review arbitration award), *and Anderson v. Norfolk & Western Ry.*, 773 F.2d 880, 882 (7th Cir. 1985) (concluding district court had jurisdiction) *with Lee v. St. Louis Southwestern Ry.*, 633 F. Supp. 19, 20 (E.D. Mo. 1986) (district court lacks jurisdiction to review arbitration award issued under protective conditions; appeal lies exclusively in Court of Appeals under 28 U.S.C. § 2342(5)), *appeal dismissed*, No. 86-1516EM (8th Cir. July 15, 1986), *and McKeon v. Toledo, Peoria & Western R.R.*, 595 F. Supp. 766, 769-70 (C.D. Ill. 1984) (review of arbitration award would be available first at ICC and then in Court of Appeals).

9. Contrary to the UTU's suggestion, Pet. at 18, the ICC did not say in *Oelwein* that its review of arbitration awards would be "purely discretionary." Rather, in explaining the standards it will apply when reviewing arbitration awards, the ICC identified a class of awards that it would "treat summarily." The Ables award is unlikely to fall into this class, which appears to encompass routine arbitration decisions awarding particular benefits to individual employees. In any event, even if the UTU were correct, this would simply mean that the path to the Court of Appeals was direct, as any arbitration award the ICC declined to review would then be the final order of the Commission.

U.S.C. § 2342(5). The UTU has offered no reasons that would warrant this Court's revisiting the well-settled principles, properly applied by the Court of Appeals, that forbid the UTU from bypassing this statutorily prescribed review procedure.

2. Despite the UTU's repeated assertions, this case presents no occasion for any interpretation of the provisions of the Interstate Commerce Act. Throughout its petition, the UTU seeks to raise a number of potentially interesting questions about the authority of the ICC and its arbitrators—for example, whether in a proceeding under 49 U.S.C. § 10505, the Commission and its arbitrators may interfere with existing RLA-protected collectively bargained work arrangements, and whether 49 U.S.C. § 11341(a) applies to transactions handled by exemption under section 10505. But these questions are irrelevant to this appeal.[10] They all go to the merits of the UTU's lawsuit—which the Court of Appeals did not consider—and are, in the first instance, for the tribunal hearing an appeal from an arbitration award to resolve (whether that be the ICC or the Court of Appeals). The UTU's contention that the question of the extent of the ICC's authority is somehow presented here is based entirely on a misreading of the Court of Appeals' decision. Indeed, the UTU not only insists, contrary to fact, that the Court of Appeals ruled on whether the ICC may negate RLA rights in a transaction authorized under 49 U.S.C. § 10505, but it rests its claim to this Court's attention largely on the asserted need to correct that purported ruling. See Pet. at 9-13. But there is nothing here to correct: the Court of Appeals decided only that the UTU had

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10. Another case, *Maine Central R.R. et al.—Exemption,* decision served September 13, 1985, Finance Docket No. 30532, *aff'd sub nom. Railway Labor Executives' Association v. ICC,* No. 85-1636 (D.C. Cir. March 16, 1987), did present many of these issues and the Court of Appeals sustained a decision in which the ICC stated that arbitrators acting under its protective conditions are authorized to order modification of existing collectively bargained work arrangements as necessary to effectuate implementation of the underlying transaction. *Maine Central R.R.,* slip op. at 6-7. See Pet. App. at 19a n.27. The UTU was a petitioner in the Court of Appeals case, and did not seek review in this Court.

brought the issue of the sweep of the ICC's statutory authority to the wrong court, and no more.

3. Contrary to the UTU's suggestion, Pet. at 14-16, the decision of the Court of Appeals does not conflict with *Schwabacher v. United States,* 334 U.S. 182 (1948), and lower court decisions relying on that case.[11] None of these cases involved a challenge to an arbitration award, and the one case that did involve a collateral attack on an ICC order—*Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*—is entirely consistent with the decision of the Court of Appeals here.

Moreover, the UTU's attempt to invoke these cases, for the general proposition that there is no process at the ICC for considering employee claims that existing collective bargaining agreements should not be altered, is unavailing. *Schwabacher* addressed the operation of 49 U.S.C. § 11341(a), but did not discuss the ICC's role in administering protective conditions, imposed pursuant to 49 U.S.C. § 11347, during the course of the implementation of transactions authorized under the ICA. The labor protective conditions, in any event, themselves provide the process the UTU contends is missing. As referee Ables recognized, the protective conditions embody a congressional directive ensuring that existing collectively bargained work arrangements will not be altered except as necessary to effectuate the authorized transaction. J.A. at 19-32. Arbitrators imposing implementing agreements under the conditions must adhere to this directive. That is exactly what referee Ables did here. We have explained above that the UTU may take any quarrel it has with the conditions, or with an arbitrator's application of them, to the ICC and the Court of Appeals. But it is simply false to suggest, as the UTU does, that the ICC lacks a process for considering employee claims respecting the need for changes in existing work arrange-

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11. *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794 (1st Cir. 1986), *cert. denied*, 107 S. Ct. 111 (1987); *Brotherhood of Locomotive Engineers v. Chicago & Northwestern Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

ments; the cases relied on by the UTU[12] support no such proposition.[13]

Nor does the decision of the Court of Appeals mark a "radical departure" from existing law governing labor relations in the railroad industry, as the UTU suggests, Pet. at 18. According to the UTU, Pet. at 16, 18, the Court of Appeals' decision results in compulsory arbitration of certain railroad labor disputes, which Congress has never required. The UTU is flatly wrong, for Congress has required precisely that. Mandatory arbitration of labor disputes arising under protective conditions has been an integral requirement of the conditions for decades. And in 1976, when Congress enacted what is now 49 U.S.C. § 11347, it required the ICC to impose conditions no less protective of employee interests than the condi-

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12. Indeed, the very decisions the UTU invokes are fully consistent with referee Ables' understanding of the role of the ICC and its arbitrators, under the protective conditions, in resolving disputes over the changes in work arrangements necessary to implement an authorized transaction. *See Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d at 800-01; *Brotherhood of Locomotive Engineers v. Chicago & Northwestern Ry.*, 314 F.2d at 431. To similar effect are *Burlington Northern, Inc. v. American Railway Supervisors Association*, 503 F.2d 58, 62-63 (7th Cir. 1974) (per curiam), *cert. denied*, 421 U.S. 975 (1975); *Nemitz v. Norfolk & Western Ry.* 436 F.2d at 844-46; and *UTU v. Norfolk & Western Ry.*, 332 F. Supp. 1170, 1174-75 (N.D. Ohio 1971).

13. The UTU's attempt, Pet. at 15, to manufacture a conflict between the Court of Appeals' decisions and the concurring opinion in *ICC v. Brotherhood of Locomotive Engineers*, 107 S. Ct. 2360, 2370 (1987) (Stevens, J.), is also unavailing. The UTU relies on a passage in which Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, states that "[a]ny tribunal that is faced with a claim that a party is violating some 'other law' has the responsibility of determining whether an exemption [under 49 U.S.C. § 11341] is 'necessary to let that person carry out the transaction. . . .'" 107 S. Ct. at 2377 n.13. This passage is certainly not addressed to the review of arbitration awards. In any event, the "any tribunal" language obviously is not meant to suggest that jurisdiction to hear the issue noted resides in any and all tribunals, as the UTU asserts. Rather, Justice Stevens plainly meant only that any tribunal that otherwise had jurisdiction would be obligated to decide the specified issue.

tions that had traditionally been imposed by the ICC to that point, as supplemented by the conditions that were adopted by the Secretary of Labor pursuant to the Rail Passenger Service Act of 1970 (the "Amtrak Act"), 84 Stat. 1327. The ICC carried out that statutory mandate. *See Railway Labor Executives' Association v. United States,* 675 F.2d 1248 (D.C. Cir. 1982); *New York Dock Ry. v. United States,* 609 F.2d 83, 87-89, 94 (2d Cir. 1979). Indeed, not only is arbitration an integral requirement of the conditions, but the ICC has just recently given express guidance to its arbitrators (paralleling the result reached by referee Ables) as to how to carry out their mission. *See Maine Central R.R.—Exemption,* slip op. at 6-7.[14]

Finally, the Court of Appeals' resolution of this case certainly does not suggest that railroad labor disputes arising from ICC-authorized transactions will have to be resolved through the self-help remedies allowed under the RLA. Rejecting collateral attacks on arbitration awards obviously does not deprive railroad employees of judicial consideration of their asserted RLA rights, as the UTU intimates, Pet. at 8, 19. Rather, it merely channels the resolution of any "conflicts" between the RLA and the ICA into the path designed by Congress. Judicial review in the Court of Appeals is assured.

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14. In fact, if settled principles are threatened at all, that threat is embodied in the position advanced by the UTU, not the decision of the Court of Appeals. The UTU, in effect, seeks to circumvent the arbitration procedure approved by Congress in order to obtain the power to block the consummation of ICC-authorized transactions by failing to reach agreement on the terms of their implementation. Congress *denied* this power to rail labor forty-seven years ago when, in considering the statutory predecessor to section 11347, it rejected a proposal, known as the Harrington amendment, that would have given labor unions a veto power over transactions by barring the ICC from approving any transaction "if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in impairment of existing employment rights of said employees." The Harrington amendment "threatened to prevent all consolidations." *Railway Labor Executives' Association v. United States,* 339 U.S. 142, 151 (1950).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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